Supreme Court, U.S.
FILED
MAR 16 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1296

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

OKLAHOMA NATURAL GAS COMPANY,
Petitioner,
v.
WILLIAMS NATURAL GAS COMPANY,
SMITH COGENERATION INC.,
POWERSMITH GOGENERATION PROJECT
LIMITED PARTNERSHIP, and
CITY OF OKLAHOMA CITY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

REPLY BRIEF FOR PETITIONER

CURTIS M. LONG *
GERALD L. HILSHER
BRAD D. FULLER
HUFFMAN ARRINGTON KIHLE
GABERINO & DUNN
1000 ONEOK Plaza
Tulsa, Oklahoma 74103
(918) 585-8141

H. BARTOW FARR, III
RICHARD G. TARANTO
ONEK, KLEIN & FARR
2550 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF AUTHORITIES

Cases Page

Atlantic Coast Line R.R. v. Brotherhood of Locomotive Engineers, 398 U.S. 281 (1970) 6
Brown v. Felsen, 442 U.S. 127 (1979) 6
City of Tacoma v. Taxpayers of Tacoma, 357 U.S. 320 (1958) 2
Kalb v. Feuerstein, 308 U.S. 433 (1940) 6
Manufacturers Light & Heat Co., 44 FPC 1219, *aff'd*, 44 FPC 1223 (1970) 2
Pan American Petroleum Corp. v. Superior Court of Delaware, 366 U.S. 656 (1961) 3
Penn General Cas. Co v. Pennsylvania, 294 U.S. 189 (1935) 5
Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923) 6

Statutes

Natural Gas Act of 1938, 15 U.S.C. §§ 717-717z
Section 1, 15 U.S.C. § 717 3
Section 7(e), 15 U.S.C. § 717f(e) 2
Section 7(h), 15 U.S.C. § 717f(h) 5
Section 19(b), 15 U.S.C. § 717r(b) ..... *passim*
Section 9 of the Federal Power Act, 16 U.S.C. § 802 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1296

OKLAHOMA NATURAL GAS COMPANY,
Petitioner,

v.

WILLIAMS NATURAL GAS COMPANY,
SMITH COGENERATION INC.,
POWERSMITH GOGENERATION PROJECT
LIMITED PARTNERSHIP, and
CITY OF OKLAHOMA CITY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

REPLY BRIEF FOR PETITIONER

The petition in this case asks this Court to decide two isues: (1) whether a state-law issue not bearing on the validity of a FERC certificate must be presented to FERC under Section 19(b) of the NGA and may not be adjudicated by a state court; and (2) whether, once a state court has determined that it has jurisdiction over the state-law issue, a lower federal court may enjoin enforcement of the state court judgment if it believes that the state court was mistaken. As we have said, we think that the Tenth Circuit, in giving affirmative answers to those questions, not only misconstrued Section 19(b) but improperly short-circuited the course of state appellate review. Respondents' arguments to the contrary do not

make the decision below any more correct or less significant.

1. Respondents insist that the Tenth Circuit's Section 19(b) ruling was fact-bound and nothing more than a "routine application" of *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320 (1958). Br. in Opp. 10. Both halves of the contention are incorrect. To begin with, the Tenth Circuit's ruling is anything but fact-bound: it commits to exclusive FERC jurisdiction—and bars from the jurisdiction of state courts—every possible claim, like ONG's, that the holder of a valid FERC certificate must comply with a particular state law. Such claims arise frequently, *see* Pet. 18-19 (citing cases), and have routinely been considered by state and federal courts outside the context of Section 19(b). *Ibid.*

The ruling below is also far from a routine application of *Tacoma*. Indeed, respondents can make that assertion—and can make their colorful complaints of end runs, piecemeal litigation, collateral attacks, and preemptive strikes—only by *assuming* that a state-law claim like ONG's is one that must be presented to FERC pursuant to Section 19(b).[1] Yet, put to proving that assumption, respondents are unable to cite a single case

---

[1] Contrary to respondents' claim (Br. in Opp. 11), Section 7(e) of the NGA does not require presentation to FERC of a claim that, even if a certificate applicant obtains a valid certificate, it must also comply with a particular state law. *Cf.* the provision at issue in *Tacoma*, Section 9 of the Federal Power Act, 16 U.S.C. § 802, which expressly places issues of compliance with state law before FERC as a prerequisite to issuance of a license. Respondents cite no case supporting their view. The general language of Section 7(e) no more applies in the present case than it did in the various decisions outside the Section 19(b) context (Pet. 18-19) addressing claims, like ONG's, that a holder of a valid FERC certificate must comply with a particular state law. *See Manufacturers Light & Heat Co.*, 44 FPC 1219, 1234, *aff'd*, 44 FPC 1223 (1970) (finding Section 7(e) satisfied, stating that "[a]pplicants can be relied on to obtain whatever authorization, if any, which may be required under the laws of the states involved") (internal quotes omitted).

holding that a claim like ONG's is subject to exclusive FERC jurisdiction under Section 19(b). Any such holding, in fact, would be contradicted by the language of Section 19(b)—which respondents pointedly never quote—because a claim such as ONG's does not seek "to affirm, modify, or set aside" a FERC certificate, but rather takes the validity of the FERC certificate for granted.[2] As we have previously pointed out (Pet. 15-16), there is a basic difference between claims that a certificate is invalid and claims that it must coexist with additional requirements of state law.

This difference escaped the Tenth Circuit, and it quite clearly escapes respondents as well. Although respondents claim that ONG "raised preemption" before FERC by challenging FERC's jurisdiction under Section 1 of the NGA (Br. in Opp. 11-13), ONG obviously did no such thing. In the first place, it is *respondents* that seek to have state law preempted; yet, while they raised preemption in state court (as a defense), they never presented that issue to FERC. The reason that they did not do so is that ONG did not raise its state-law claim in the FERC proceeding. The question whether FERC has jurisdiction under Section 1 of the NGA to issue a certificate, which

---

[2] Such a holding would also run afoul of this Court's decision in *Pan American Petroleum Corp. v. Superior Court of Delaware*, 366 U.S. 656 (1961), which, contrary to respondents' assertion (Br. in Opp. 15 n.8), held that Section 19(b) did not oust state courts of jurisdiction to decide a state-law claim even though the defendant raised a preemption defense.

Respondents take wholly out of context (Br. in Opp. 15 n.8) the statement in *Pan American* that the Court "was not called upon to decide the extent to which the Natural Gas Act reinforces or abrogates the private contract rights . . . in controversy" (366 U.S. at 664). That was so simply because the Court did not have before it the merits of the preemption defense and the state courts' jurisdiction depended only on the substance of the plaintiff's complaint, not on the substance of the defense. "The fact that Cities Service sues in contract or quasi-contract, not the ultimate validity of its argument, is decisive." *Ibid.*

ONG did raise before FERC, is different from the question whether, in any event, a FERC-certificated project must also comply with a particular state law,[3] which ONG raised in state court.

Respondents' efforts to align FERC with their position are unavailing. Br. in Opp. 14-15. In the Tenth Circuit, FERC did *not* argue that the issues of state law and federal preemption must be decided by a reviewing court under Section 19(b), as the Tenth Circuit eventually concluded. Rather, it actively urged the Tenth Circuit itself to decide whether the state franchise law was preempted. Resp. App. 43a-45a.[4] In short, FERC, the statute, and uniform case law all differ with the Tenth Circuit's view that Section 19(b) provides the exclusive avenue for asserting a claim that a holder of a valid FERC certificate must also comply with state law.

2. With respect to the injunction against the state-court judgment, respondents do not deny that the Tenth

---

[3] Thus, respondents themselves acknowledge that, even with a valid FERC certificate, Williams was subject to state environmental laws. Br. in Opp. 3. As respondents also note (Br. in Opp. 12 n.5), FERC itself stated that its view on the preemption of the state franchise law played no role in its certificate decision and specifically noted that the preemption question had not yet arisen, distinguishing it from the question of jurisdiction. Pet. App. 72a.

ONG suggested that FERC briefly defer its ruling on the certificate application pending an imminent decision by the state court. *See* Br. in Opp. 6. Without asserting that the expected state court decision was actually relevant to issues in the FERC proceeding, ONG stated simply that the state "action goes directly to the interests of the citizens of Oklahoma City." Resp. App. 38a.

[4] The statements in FERC's brief quoted by respondents (Br. in Opp. 15) are not at all to the contrary. The first merely asserts FERC's interest in the case and its view on the merits of the preemption question, stating that the state-court ruling would "unlawfully render unenforceable the Commission's orders." The second is by its terms addressed purely to ONG's policy concerns, which ONG did raise before FERC, not to ONG's claim under state law.

Circuit substituted its own order for the normal process of state appellate review. Respondents simply say that this extraordinary departure was justified because state courts should not have been exercising jurisdiction in the first place. Respondents' arguments are meritless.

Respondents first assert that the injunction was necessary because the state court order "interfered with the federal court's priority of *in rem* jurisdiction" under Section 7(h) of the NGA. Br. in Opp. 17. This basis for the injunction, of course, is wholly respondents' invention: it was not relied on (or even mentioned) by the court of appeals. Moreover, there are good reasons for the Tenth Circuit to have avoided reliance on the point. First, the cause of action under Section 7(h) properly covered only the condemnation of property rights, and had nothing to do with the adjudication of ONG's rights and Williams' obligations under the state franchise law. The latter questions were injected into this case by Williams only under a separate state-law pendent cause of action. *See* Pet. App. 97a-99a.[5] Second, and in any event, the Tenth Circuit did not seek to protect *its own* jurisdiction to decide the issues addressed by the state court but the jurisdiction of another court of appeals (the D.C. Circuit). Respondents do not explain how the state court's decision of those issues could have interfered with the *in rem* jurisdiction of a court that itself was barred from addressing those issues.

---

[5] Section 7(h) provides for condemnation of easements that may be used to "construct, operate, and maintain" a pipeline, but it is addressed only to the securing of property interests. A holder of such an interest must comply with other applicable laws, such as environmental laws, that might restrict activities using those property interests. Similarly, *in rem* jurisdiction is exclusive only to the extent "necessary for the appropriate control and disposition of the property," and other courts do not lose their "power to make orders which do not conflict with the authority of the court having [*in rem*] jurisdiction." *Penn General Cas. Co. v. Pennsylvania*, 294 U.S. 189, 198 (1935).

Respondents' two other principal arguments in support of the injunction are no stronger. First, respondents suggest that the federal court collateral attack on the state court decision was permissible because Oklahoma law would not give preclusive effect to the state court decision. Br. in Opp. 18. Not surprisingly, however, respondents cite no Oklahoma decision that would allow a party to attack a state court decision collaterally on grounds of lack of jurisdiction rather than simply appeal the decision. An appeal was the proper way to proceed here as well. *See Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281 (1970).

Second, respondents suggest that the lower federal court injunction was proper because the NGA "creates an exclusive jurisdictional scheme." Br. in Opp. 18. But the Oklahoma courts expressly concluded that they had jurisdiction over petitioner's claim, notwithstanding respondents' arguments about exclusive federal jurisdiction. While the Tenth Circuit plainly took a different view, that disagreement provides no grounds for bypassing the ordinary process of direct appeal by which any erroneous assertion of jurisdiction is typically to be corrected. Respondents are thus unable to cite any decision of this Court that supports such interference with state judicial processes. *See* Br. in Opp. 19 n.12 (citing cases).[6]

---

[6] We note, in particular, that *Kalb v. Feuerstein*, 308 U.S. 433, 438-44 (1940), whose current meaning is in considerable doubt (Pet. 26-27), not only arose in the possibly unique context of bankruptcy, but did not in fact involve a collateral attack on a previously decided question. And *Brown v. Felsen*, 442 U.S. 127, 134-39 (1979), merely declined to apply *claim* preclusion where its application would encroach on the federal (bankruptcy) scheme; the Court expressly noted that *issue* preclusion principles were different and that collateral relitigation of at least a factual issue actually decided by the state court would not be permitted. 442 U.S. at 139 n.10. In the present case, the state court actually decided that it had jurisdiction.

In short, even if the state court lacked jurisdiction, review of its contrary holding should have been sought only through direct appeal, and the Tenth Circuit erred in ordering the district court to enjoin enforcement of the state court order for lack of jurisdiction. That intrusion on state judicial authority should not be allowed to stand without this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

CURTIS M. LONG *
GERALD L. HILSHER
BRAD D. FULLER
HUFFMAN ARRINGTON KIHLE
GABERINO & DUNN
1000 ONEOK Plaza
Tulsa, Oklahoma 74103
(918) 585-8141

H. BARTOW FARR, III
RICHARD G. TARANTO
ONEK, KLEIN & FARR
2550 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184

* Counsel of Record